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2 October 2019

The Hon Christian Porter MP  
Attorney-General of Australia  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General,

### **Submission on Religious Discrimination Bills & the Impact on Australian Sikhs**

#### ***Who We Are***

1. The Australian Sikh Association (**ASA**) is the pre-eminent representative body for Sikhs in the Australia. It has over 2,000 registered members in the Sydney metro area alone. Weekly congregation of the Gurdwara Sahib Glenwood in NSW (the Sikh Centre which ASA is entrusted to operate) ranges between 5,000 and 10,000, depending on the time of year.
2. ASA is responsible for operating the Gurdwara Sahib Glenwood in NSW and other charitable, social, sporting and educational programs and activities which are accessible to all Australians, without any discrimination.
3. Its established purposes are charitable include; to promote an understanding of the Sikh philosophy, identity, religion and culture in Australia and to make representations to the Government and other organisations on matters affecting the Sikh faith at local, state, federal and international forums.
4. UNITED SIKHS (**US**) is a UN affiliated, international, non-profit, non-governmental, humanitarian relief and advocacy organization, aimed at empowering those in need, especially disadvantaged and minority communities across the world. It is registered as a not for profit non-government organisation in 10 countries, including Australia (ABN 24 317 847 103).
5. UNITED SIKHS has advocated for religious freedom of minorities, including Sikhs, since its inception in New York in 1999.

#### ***Joint Submission***

6. Together we thank you for the opportunity to make this joint submission in respect of the Religious Discrimination Bill 2019, the Religious Discrimination (Consequential Amendments) Bill 2019 and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (**the Bills**).

7. Our interest in commenting on the Bills relates to the paramount importance of the protection of the right of freedom of religious belief and practice for Australian persons of Sikh faith and the efficacy of the Bills in doing this.

### ***Abstract***

8. To start, we commend you on committing to giving effect to the measures recommended by the Expert Panel of the Religious Freedom Review<sup>1</sup>, by way of developing a legislative package to better protect the right of freedom of religious practice and belief in Australia.
9. We support wholeheartedly the enactment of the Bills into Australian federal law.
10. This is because although it has been the position under Australian federal law that it is unlawful to discriminate on the basis of a number of protected attributes including age, disability, race, sex, intersex status, gender identity and sexual orientation in certain areas of public life, religion based discrimination has never before been expressly protected by the Australian federal law. It has been protected in differing degrees by some States and Territory legislation, thereby creating confusion and inconsistency.
11. The status quo position with regards to the protection of religious freedom is plainly unsatisfactory. It not only places Australia far behind the position across all comparable jurisdictions internationally, but also behind our own domestic expectations.
12. Australia is a party to the International Covenant on Civil and Political Rights (**Covenant**) and as such is legally bound to enact laws which are consistent with a number of Articles of the Covenant - which together recognise an individual's right to freedom of thought, conscience and *religion or belief*.
13. Fundamentally, to not have an enshrined protection of the right to freedom of religious belief and practice in Australia at a federal level is a failure to recognise the indivisible and inalienable nature of human rights.
14. Presently, there exist aspects of Australian law which fail to protect these rights. For Australian Sikhs, these include aspects of the law which require the removal of articles of faith such as a Turban and a Kirpan.
15. On their face, the Bills endeavour to protect the fundamental human right of freedom of religion of all Australians in certain areas of public life. However, we believe that further clarification is essential to ensure consistent application of the protections intended by the Bills to all Australians.
16. In particular, the general exceptions need to be simplified and improved with respect to their intent to override inconsistent State and Territory laws which create opportunity for inconsistent religion-based discrimination.
17. Also, the provisions of the Bills relating to 'temporary exemptions'<sup>2</sup> require clarification, or additional guidance to allow for fair and consistent application to all Australians including in particular, Australian Sikhs.

### ***Australian Sikhs***

18. Sikhs believe that all people, regardless of religion, race, gender, creed, caste and colour are creatures of the same Creator. Through this the Sikhs embrace the principle of equality. They honour the right of all

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<sup>1</sup> See its report dated 18 May 2018

<sup>2</sup> Part 3, Division 4, Subdivision C of the Racial Discrimination Bill 2019

people to worship freely and that it is essential to liberty that one earns an honest living by one's own hard work, without living off another or deceiving others.

19. In Australia, the Sikh faith is the fifth largest religion. Victoria has seen the sharpest increase in the number of Sikhs over the last five years, with recent Census data revealing that there are no less than 52,762 Sikhs in Victoria. NSW has the second largest Sikh population in Australia, where at least 31,737 Sikhs reside, followed by Queensland with 17,433, Western Australia with 11,897 and South Australia with 8,808 living there. Canberra (ACT) has a total of 2,142 Sikhs, while Northern Territory and Tasmania have smaller populations, of under 700 Sikhs each. In fact, the number of Sikhs living in Australia has risen in the vicinity of 500% in the past 10 years.
20. Australian Sikhs have a long history of contribution and service to Australian society. We pride ourselves on being part of Australia's rich multicultural history for almost 200 years. Sikhs have worked as cameleers, hawkers, shopkeepers and even professional wrestlers in the early days of colonial Australia.
21. Later, Sikhs served in Australia's armed forces in both world wars, records even show a number of Sikh soldiers were among the Anzacs at Gallipoli. Australian Sikhs have made notable contributions to farming, transportation and logistics and to various other areas of human endeavour including medicine, science, engineering, law and business.

### ***Sikh Articles of Faith***

22. An initiated Sikh, known as a Khalsa, is required to observe essential principles of carrying a kirpan (sword), maintaining Kesh (uncut hair), wearing a Kara (steel or iron bracelet), carrying a Kanga (wooden comb) and wearing a Kacchaera (cotton underwear).
23. Kesh is the keeping of one's hair uncut. Head hair is never trimmed or cut for any reason. It is a gift from God. It is the first and foremost duty of a Khalsa to keep his or her God-given form intact. This is a requisite and an inviolable vow. The uncut head hair must be kept wrapped in a Turban. The Sikh Turban is an outward commitment of the mission given to all Sikhs to stand for truth, against tyranny and to protect the weak – and by doing so, to uphold liberty, equality and fraternity.
24. A Sikh person who wears a Turban is not permitted to be seen in public without a Turban, or to be seen to remove their Turban in public. In this way, the Turban is not an article of clothing, it is in fact part of one's *being* a Sikh.
25. Indeed, the head of the temporal Sikhs, the Akal Takhat, has stated a Sikh person is only to wear a Turban on their head and is not permitted to wear a helmet under or over their Turban.
26. The Sikh Reht Maryada is the Sikh Code of Conduct. It provides that a Sikh is to wear a Turban and not any other headwear. The Sikh Reht Maryada is endorsed by the Akal Takhat Sahib, which is a 400 year old temporal seat for Sikhs that was set up by the 6th Sikh Guru (or spiritual and temporal leader).
27. Also, the United Nations Human Rights Commission (**UNHRC**) when adjudicating in favour of an application by an overseas branch of UNITED SIKHS against the French Turban ban recognised that the Turban is an integral part of the Sikh identity and that a Sikh will not remove his or her Turban.
28. Quite evidently, the requirement is strict and makes it impossible for a Sikh person who wears a Turban to comply with the *Road Rules 2008* (NSW) which provide at rule 256 that a rider of a bicycle which is not parked must wear an approved bicycle helmet securely fitted and fastened on the rider's head. This is compulsory unless the rider is exempt from wearing a bicycle helmet under another law of the jurisdiction. There is no law in the jurisdiction of NSW which expressly exempts a Sikh person who wears a Turban from the requirement in the road rule.

29. UNITED SIKHS have long advocated for the introduction of an exemption to the road rule in NSW, consistent to a greater or lesser degree with the position in other States and Territories.
30. The Kirpan is another of the essential articles of faith that must be carried at all times by an initiated Sikh to remind him or her of their duty to uphold and defend the truth courageously. It is similar to a miniature steel or iron sword and is kept in a protective scabbard and held in a cloth holster on the body. In Victoria, despite the suite of legislation designed to protect individual right to freedom of religious practice and belief, the Kirpan is not permitted to be carried by a person who is (for example) subject to a family intervention order, even in circumstances where the Kirpan was not relevant whatsoever to the circumstances of the making of the order. To additionally deprive a person of their freedom to religion duplicates the punitive impact of the family intervention order and cannot have been the intention of Parliament.
31. Clearly, a more even balance must be struck between the public interest of safety and the right of the individual to practice his or her faith, which is of itself in the public interest of maintaining a free and civil society.

### ***Personal Experiences***

32. Regrettably, we see daily examples of religion-based discrimination against Australian Sikhs.

#### *Turban – blanket requirement*

33. Mr G Singh is a baptised Australian Sikh. He recounts how he worked for a mining equipment manufacturing company for over 16 years. He says that during his employment with the company, he always wore his Turban, which is mandatory under the Sikh code of conduct. He describes that due to some safety incidents, his employer issued a blanket requirement and made it mandatory for all employees to wear a hard hat while in the company workshops.

34. He says;

*“It was a shock for me. I tried to convince management during consultation by informing them about Sikhism and my religious obligation to wear Turban. I asked for exemption from wearing hard hat based on my area and type of work and my religious obligation.*

*I was told that due to safety requirement management was unable to compromise. Consequently, I was stood down for few days.”*

35. Mr Singh was forced to take the matter to the authorities and requested to be exempt from the blanket requirement on all employees regardless of the nature of the work from having to wear a hard hat. He describes that the authorities informed him that under the Work Health and Safety Regulation 2017 (NSW), it was the responsibility of person conducting the business to ensure the health and safety of its employees.
36. Essentially, the determination of whether wearing the hard hat and thereby discriminating against Mr Singh based on his Turban, was a decision that only the employer could make. Luckily for Mr Singh, a safety committee of the employer undertook a review of situation and decided to lift the blanket mandatory requirement to wear hard hat in the area in which Mr Singh was working.

### *Turban - construction sites*

37. Another rather devastating and unfortunate example of religion-based discrimination is as experienced by Mr C Singh. Mr Singh is a construction industry professional with B. Arch, Dip in Project Management, Dip in Construction Management.
38. Mr Singh worked for NSW Public Works (**PW**) as a Project Officer for 10 years. His duties included construction site visits for the purpose of review of construction progress and project management. During his initial induction training, he was told by Safety Officers that it was mandatory that he wear helmet on construction sites as it was necessary under law and that there was no exemption available to him.
39. In an effort to support him, the management of PW provided Mr Singh with a separate change room to manage his change from Turban to wearing a helmet. Although the accommodation was in good faith, it forced Mr Singh to violate an essential precept of his faith.
40. He states that;

*“Though this was a very kind and accommodating gesture and I understand that hands of PW management were tied due to legislation. Wearing a Turban is different to wearing a hat and removing it is a very uncomfortable scenario. Availability of a change room on all sites and times was not possible and I could not have asked it to be provided as this was a requirement out of ordinary and would add cost to the project and reflect on my KPI's.*

*Changing in a toilet was not something possible due to turban falling on the floor while tying [it] and also other users using the toilet are while I would have been tying my turban in front of a mirror.”*

41. His predicament was worsened because he was regularly required to attend and/or chair meetings with various stakeholders immediately after construction site visits which did not allow him time to tie his Turban. Often times, he was forced to attend such meetings without his Turban – an uncomfortable and potentially embarrassing experience.
42. He says;

*“This restriction limits my professional growth in construction industry as employers would be reluctant to hire me if I raise this issue or ask for a special favour.*

*Personally, this also lowers the confidence as I have to ask for something which brings unnecessary attention to me. This also forced me to think and look at other avenues within construction which required less or no site visits and heavily restricting my professional choices.”*

### *Turban – bicycle riding*

43. Another unfortunate incident of discrimination was reported to us involving a teenage Sikh boy<sup>3</sup> wearing his Turban riding a bicycle in his neighbourhood park with friends.
44. He says,
- “I had experienced discrimination from individuals my age, at the time, I had yet to experience it from adults; people I thought were older and wiser than I was. However, on this day, this unrealistic perception was about to change.”*
45. The boy was aggressed by an unidentified adult who yelled loudly at the boy chased him down and stopped his bike by the handlebar. The man yelled about the boy's Turban while riding a bicycle and threatened to call the police.

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<sup>3</sup> Chosen to remain anonymous

46. He reports that “...on that day, for the first time in my life, I had felt as though my wearing of a Turban may have been a crime.”

47. Regrettably, we are confident this is not an isolated experience.

#### *Kirpan – public spaces*

48. We are aware of another discouraging example of religion-based discrimination that occurred in 2016 at NSW Parliament House in Macquarie Street, Sydney. Three Sikh youths (one female and two male, each aged 21) were refused entry into the NSW Parliament House to attend, rather ironically, an interfaith public event.

49. The refusal was based on their carrying of Kirpans necessary to their religious beliefs and activities. Although the *Summary Offences Act 1988* (NSW) allows for a person that provides a ‘reasonable excuse’, to have in his or her custody, a knife in a public place or school, it is ambiguous as to whether carrying a Kirpan into a public place constitutes a the requisite ‘religious purpose’ of the type contemplated by the provision.

50. Having been refused entry to an interfaith event, held at a public government building left them in a state of shock and disbelief.

51. The three later were told that there existed a protocol which required Sikhs carrying a Kirpan and wanting to enter the NSW Parliament House building were required to obtain prior approval.

52. Although this is an accommodation, it again demonstrated the urgent need for legislation supporting a clear and consistent approach to allow for the movement of people of all faiths throughout public spaces, is would be relevant to spaces such as courthouses.

#### *Turban – education*

53. In February 2016, Mr and Mrs Arora decided to enrol their 5-year old son Sidhak Singh as a prep student in the 2017 intake of Melton Christian College (**MCC**). Sidhak’s application did not proceed after his parents were told that MCC’s principal that Sidhak would have to comply with the school’s uniform policy, which required boys must have short hair and may not wear any head coverings.

54. The matter was taken before the Victorian Civil and Administrative Tribunal (**VCAT**) which determined that the boy was unlawfully discriminated against pursuant to the provisions of the *Equal Opportunity Act 2010* (VIC) owing to his exclusion from MCC because of his religious belief that he should have uncut hair and his religious activity, being not cutting his hair and wearing a patka (a small piece of cloth wrapped in a particular manner around the head, especially by Sikh boys or young men).

55. It is regrettable that Sidhak was forced to seek independent administrative review to assert his identity as a Sikh boy. Had Sidhak been resident in NSW, the outcome may have altogether different since there is no express protection of freedom to practice activity and beliefs<sup>4</sup>.

#### ***Existing provisions are inadequate and inconsistent***

56. Clearly, the existing legislative framework is failing to protect the right to freedom of religion which is an indivisible and fundamental human right.

57. It has led to many instances of discrimination based on religion which can be extremely degrading to the individual involved, to the Sikh community as a whole and therefore detrimental to the very fabric of Australian civil society.

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<sup>4</sup> *Anti-Discrimination Act 1977* (NSW) offers protection against race and ethno-religious based discrimination.

58. Indeed, the Expert Panel found inconsistent approaches to religious freedom and levels of protection of it as between the Commonwealth and the States and Territories, and as between the various States and Territories.
59. As mentioned, in NSW, a Sikh person is effectively prevented from riding on a bicycle owing to the notable absence of an exemption to the requirement to wear a helmet in the NSW road rules. This position is not only inconsistent with the position in the other States and Territories, but also with existing federal anti (race) discrimination laws which by virtue of section 109 of the Constitution of Australia render the NSW relevant road rule (rule 256) invalid.
60. Religion, religious activity or belief or conviction is not protected in NSW in any area of public life such as work, education, goods and services and facilities, accommodation, clubs and associations, requests for information, superannuation and insurance, access to premises, administration of laws and programs and sports. Nor is there any religious exemptions in those areas in NSW and (to varying degrees) in each of the other States and Territories.

### ***The Bills***

61. Clearly, there is an urgent need for a harmonisation of the anti-discrimination laws insofar as they relate to the protection of an individual's right to freedom of religious activity and belief.
62. We are optimistic that the Bills (once enacted) will apply in certain areas of public life such that discrimination based on the Turban, the Kirpan or on the other mentioned essential articles of the Sikh faith will not be permissible unless an exception or exemption applies.
63. However, there remain aspects of the general and specific exceptions and the exemption procedure which require improvement.

### ***General Exception***

64. The general exception relating to legislative compliance provides that certain conduct does not amount to unlawful discrimination if it is required to be done in direct compliance with State and Territory legislation<sup>5</sup> which was not prescribed by the regulations<sup>6</sup>. This circular drafting makes the final position difficult to understand by most persons who may be affected by the exception. It has the potential to cause great confusion – which makes it ripe for dispute and inconsistent and potentially unfair application.
65. That risk is compounded as there remain *in force* parts of State and Territory laws, compliance with which, constitutes religion-based discrimination against Sikh Australians<sup>7</sup>. To minimise confusion and maximise consistency, we suggest that clarification in the form of addition of a test, or factors and considerations which set out the circumstances in which compliance with State or Territory legislation is not compulsory.
66. Such addition will provide clear and narrow path to administrative review should a State or Territory law not be included expressly in the regulations – which may be by way of oversight or unintended onerous discriminatory consequence of direct compliance.

### ***Specific Exceptions***

67. A specific exception provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity in employment or in a partnership if the other person is

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<sup>5</sup> s.29(3) of the Religious Discrimination Bill 2019

<sup>6</sup> s.29(4) of the Religious Discrimination Bill 2019

<sup>7</sup> As discussed, for example, the NSW Road Rules (helmet requirement), the Work Health and Safety Regulation 2017 (NSW) (personal protective equipment) and arguably s.11C of the Summary Offences Act 1988 (NSW) (Kirpan in public places)

unable to carry out the ‘inherent requirements’ of the employment or the partnership because of their religious belief or activity<sup>8</sup>.

68. There is danger that this specific exception will come to be applied differently by different employers but in similar circumstances. For example, it is not an ‘inherent requirement’ of the work of a construction site manager to undertake work which will expose him or her to high level of risk, at least by comparison to a site worker. So, he or she ought to not fall within the workplace exception to the general protections offered by the Bills.
69. Fortunately, the High Court of Australia has clarified that whether or not certain requirements will constitute ‘inherent requirements’ of the particular work will depend on whether the requirement is ‘something essential’ to, or an ‘essential element’ of, the particular position. The High Court held that this question must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer’s undertaking and by reference to the organisation<sup>9</sup>.
70. We suggest that aspects of the test established by the highest court of Australia should be included directly in the Religious Discrimination Bill 2019 which would provide abundant clarity to persons seeking to avail themselves of the specific exception.

### *Temporary Exemption*

71. We agree that temporary exemptions that can be granted by the AHRC are a good solution and permit a case by case assessment of the risks involved, etc of each particular circumstance in which a balance is sought to be achieved between legitimate discrimination and unlawful discrimination.
72. As noted by commentators, the application and interpretation of the temporary exemption should not depend on “who complains the most” and what evidence of hardship is able to be produced before the AHRC, or indeed on appeal to the Administrative Appeals Tribunal (**AAT**) or Federal courts.

### *Test*

73. The right to seek administrative appeal of a decision of the AHRC is provided for in s.40 of the Religious Discrimination Bill 2019. To minimise the risk of inconsistent grants of temporary exemptions and therefore a proliferation of administrative appeals to the AAT, we submit that a test should be incorporated into the Religious Discrimination Bill 2019 by way of (for example) a new section 40A which would set out the factors that the AHRC is required to consider when determining whether or not to grant a temporary exemption to permit certain actions which would but for the temporary exemption be unlawful under the Bills.

### *Guidelines*

74. Alternatively, we submit that supplementary guidelines<sup>10</sup> to support the legal protections intended by the Bills (once enacted) must be developed and published. It is anticipated that amongst other things, such guidelines would set out the considerations and circumstances the AHRC will consider when determining an application for temporary exemption under s.36 of the Bill.
75. We are of the strong view that in the interests of transparency, fair and consistent application of the Religious Discrimination Bill 2019, these measures will be beneficial.

### *Specialised Administrative Review*

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<sup>8</sup> s.30(2) of the Religious Discrimination Bill 2019

<sup>9</sup> *Qantas Airways Ltd v Christie* (1998) 193 CLR 280

<sup>10</sup> Similar to the Australian Government Guidelines on the Recognition of Sex and Gender (Updated November 2015)

76. We also submit that a specialist Division ought to be created within the AAT to allow for proper consideration of appeals from the AHRC. Also, a support line/service similar to the Concierge Service of the Office of the Australian Small Business and Family Enterprise Ombudsman should be created to provide advice to appellants to reduce costs.

**Conclusion**

77. At their heart, we view the Bills to be about equality of all Australians before the law – a philosophy central to the Sikh faith. With our suggested changes and improvements, we are optimistic that the Bills (once enacted) will more consistently achieve the right balance between the protection of the public interest and the individual human right to freedom of religious belief and activity
78. We thank you for taking the time to consider our submissions and allowing us to participate in the debate surrounding the introduction of what we believe are highly worthy, long overdue and necessary protections.
79. We respectfully request permission to make oral submissions before the appropriate Parliamentary committee to supplement our joint submission.

Should you have any questions about our joint submission, please contact [law@unitedsikhs.org](mailto:law@unitedsikhs.org), [mejindarpalk@gmail.com](mailto:mejindarpalk@gmail.com), [bschahal@live.com.au](mailto:bschahal@live.com.au) and [companysecretary@asaltd.org.au](mailto:companysecretary@asaltd.org.au)



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